

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL A. IRVING,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 242198

Wayne Circuit Court

LC No. 01-006302-01

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Defendant was convicted by jury of carrying a concealed weapon (CCW), MCL 750.227, possession of a firearm by a convicted felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent terms of nine months to five years' imprisonment for the CCW and felon-in-possession of a firearm convictions, to run consecutive to two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

In his sole issue on appeal, defendant argues that the trial court improperly influenced the jury when the trial court, in overruling defendant's objection to a police officer's inconsistent testimony, stated, "Well, it is his testimony. You can cross on that." Defendant claims that this comment was an improper finding of fact that usurped the function of the jury because the police officer had previously testified that the gun was recovered under a minivan, and the trial court's statement represented the trial court's opinion that the gun was found on defendant's person. We disagree.

This issue is not properly preserved because defendant failed to object to the trial court's comment, and therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). To establish plain error, the defendant must show that the error was plain, i.e., clear or obvious, and that the plain error affected substantial rights, generally requiring a showing of prejudice in that the error affected the outcome of the lower court proceedings. *Id.*

A defendant in a criminal trial is entitled to a "neutral and detached magistrate of justice." *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992), quoting *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987). However, the court is bound to exercise reasonable control over the proceedings to ensure that the trial is both expedient and

just. MCL 768.29. Generally, a conviction will not be reversed unless the trial court record, reviewed as a whole, shows that the trial court's conduct or comments unduly influenced the jury, thereby depriving the defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

We conclude that on the facts of the instant case, defendant has not established plain error because the trial court's statement was not actually inaccurate, as the witness had testified, immediately prior to defense counsel's objection and the court's statement, that he "confiscated [the gun] from the defendant." Furthermore, any potential prejudice was eliminated because defendant was able to establish on cross-examination that the gun was actually recovered from under the minivan and not on defendant's person. Therefore, defendant has failed to establish that the trial court's comment constituted plain error that prejudiced him by affecting the outcome of the lower court proceedings. *Carines, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage